United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1049

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTHUR BREC[illegible],

Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*

DAVID G. TRAGER,
United States Attorney,
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v.

ARTHUR BRECHT,

Appellant.

PETITION FOR REHEARING OR REHEARING EN BANC

PRELIMINARY STATEMENT

The United States of America, by DAVID G. TRAGER, United States Attorney for the Eastern District of New York, hereby petitions for rehearing or, in the alternative, rehearing en banc, of the judgment of a panel of this Court entered on July 16, 1976, which reversed the conviction after a jury trial (Weinstein, J.) of appellant ARTHUR BRECHT on two counts alleging violations of the Travel Act. The petition for rehearing en banc is filed pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure, which provides for such petitions "when consideration by the full court is necessary to secure or maintain uniformity of its decisions or when the proceeding involves a question of exceptional importance."

STATEMENT OF FACTS

Appellant was charged in an indictment filed on August 8, 1975, with one count of interfering with interstate commerce by means of extortion (Hobbs Act, Title 18, U.S.C., §1951) and with two counts of traveling in interstate commerce with intent to promote the unlawful activities of larceny by extortion and commercial bribe receiving (Travel Act, Title 18, U.S.C., §1952), in violation of the laws of New York State.[1/]

The evidence at trial showed that appellant, the manager of the technical publications group at Westinghouse Electric Corporation (WEC), Lester, Pennsylvania, was responsible for delivering technical manuals to the El Paso (Texas) Electric Company, in connection with a $23,000,000 prime contract between WEC and El Paso Electric Company for the construction by WEC of a power generating plant. Appellant decided to subcontract the publication of these manuals and traveled on several occasions from Pennsylvania to New York to discuss a bid submitted by Joseph Racker, the president of National Technical Publications.[2/] National Technical Publications was a supplier of technical manuals and was substantially engaged in interstate commerce. Appellant demanded a kickback from Racker as a condition

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1/ New York Penal Law, §155.05 (2)(e)(ix) and 180.05 (McKinney's 1975).

2/ The court's recitation of the facts erroneously states that the intended victim of the extortion, Joseph Racker, traveled from Pennsylvania to New York.

precedent for the subcontract with WEC, with $1000 to be paid in advance and $1500 to be paid after the award of the contract. Appellant was to give Racker 215 shares of virtually worthless stock in return, as a cover-up of the true nature of the transaction. It is worth noting that in denying a motion for acquittal at the close of the trial, Judge Weinstein found, on the basis of prior similar acts evidence presented by the Government, that appellant had engaged in a course of conduct involving the receipt of kickbacks and gratuities from subcontractors.

Appellant urged on appeal that the Travel Act proscription against interstate travel to promote bribery in violation of the laws of the state in which the bribery was committed does not encompass commercial bribery and that the Government had not established sufficient evidence to show extortion under the Hobbs Act.

On July 16, 1976, a panel of this Court (Circuit Judges Moore, Feinberg and Gurfein) filed an opinion reversing the convictions on the Travel Act counts. In reversing the Travel Act convictions, the panel held that "the Travel Act does not cover the crime of commercial bribery." United States v. Brecht, ___F.2d___, Slip op.

5031, 5040 (2d Cir., July 16, 1976). The panel arrived at its holding by concluding that the legislative history of the Travel Act indicated that the primary concern of Congress in enacting the statute was not bribery as engaged in by appellant (in the panel's words, a violation of "local law", Id. at 5038) but rather the activities of organized crime.

REASONS FOR GRANTING THE PETITION FOR REHEARING

We most respectfully submit that in reversing the Travel Act convictions the panel which decided this case misinterpreted the facts of the case, the legislative history of the Travel Act and the pertinent case law.

I

This misinterpretation is typified by the panel's quotation of Judge Friendly's remarks, in an entirely different context, in the case of United States v. Archer, 486 F.2d 670, 679 (2d Cir. 1973), that the Travel Act, "if read literally, would cover a $10 payment to fix a traffic ticket if only the person desiring the fix walked across a state line to pay off the policeman." The panel then states, "the example given comes close to this case". The panel's opinion has completely ignored the substantial potential effect on interstate commerce of the kickback sought by appellant. Indeed, the evidence showed that appellant's production of the technical manuals was an important aspect of the $23 million dollar contract - quite simply, the power generating machines could not have

been operated without the instruction manuals. Moreover, National Technical Publications, the company owned by the intended victim, was a new firm trying to build up its business, and its resources would have been seriously diminished by the kickback demand. Appellant's activities clearly had the potential to affect over $23,000,000 worth of commerce and the affairs of corporations in three states. To cavalierly compare this case with a $10 traffic ticket fix erroneously minimizes the serious nature of appellant's crime.

II

In impliedly restricting "bribery" to corruption of public officials, the panel appears to have based its holding on the view that commercial bribery is "typically ...not a feature of organized crime," whereas corruption of officials is. United States v. Brecht, supra, at 5039. Consequently, so the argument goes, Congress, which was concerned with the activities of organized crime when it enacted the Travel Act, did not intend that commercial bribery fall within the scope of the statute. This basis for the holding, we respectfully submit, is totally incorrect. To begin with, the panel has, sua sponte, determined what is and what is not a "feature of organized

crime." Most importantly, however, it has ignored the fundamental intent of Congress in enacting the Travel Act: namely, providing a means of combatting organized crime. United States v. Nardello, 393 U.S. 286, 290 (1969). The evil sought to be eradicated by the statute was the whole range of activity of organized crime, including the infiltration of "legitimate businesses." Id. at 295 n. 13. In this regard, Congress was concerned with stopping the infiltration of legitimate business by organized crime, not simply with eradicating specific forms of extortion and bribery.

Moreover, reading Nardello together with the opinion in Brecht, we must conclude that while the use of extortionate means to infiltrate legitimate business is within the scope of the Travel Act, commercial bribery (as practiced by appellant) is not. The anomolous consequence of these two cases is that a criminal who resorts to extortion to infilitrate a business may be charged under the Travel Act, but a gangster who employs bribery to obtain an identical result may not be so prosecuted.[3/] It would be difficult to imagine a clearer

3/ Judge Gurfein's admission that the line between solicitation of a commercial bribe and extortion of a payment is thin, United States v. Brecht, supra at 5041 n. 11, does nothing to clarify this curious result.

example of frustration of Congressional intent.[4/]

It is significant to note that in testifying on May 12, 1961, in support of his Program to Curb Organized Crime and Racketeering, from which §1952 originates, Attorney General Robert Kennedy referred to Senator Kefauver's Report on Organized Crime in 1951.[5/] This report cites the practice of organized criminals of creating economic ties with apparently legitimate businessmen, of infiltrating legitimate businesses, and of securing contracts with legitimate businesses.[6/] Attorney General Kennedy also spoke of bribery of amateur athletes and of employees who are union officials.[7/] Clearly, Congress considered bribery of non-public officials in connection with the Travel Act. The legislative record supports the Government's argument that "bribery" should not be restricted to corruption of public officials and should include commercial bribery.

4/ Moreover, the panel's analysis invites a case-by-case determination of whether extortion or commercial bribery has been proven. This is a common defense raised in Hobbs Act cases. See, e.g., United States v. Pranno, 385 F.2d 387 (7th Cir. 1967); United States v. Sopher, 362 F.2d 523 (7th Cir. 1966); United States v. Critchley, 353 F.2d 358 (3rd Cir. 1965); and United States v. Brecht, supra.

5/ Hearings on the Attorney General's Program to Curb Organized Crime and Racketeering before the House Committee on the Judiciary, 87th Cong., 1st Sess. 11, 19 (1961).

6/ Report of the Special Senate Committee to Investigate Organized Crime in Interstate Commerce, dated May 1, 1951, pp. 2, 5.

7/ Hearings on the Attorney General's Program, supra, 25, 31.

Moreover, while Section 1952 was directed at organized crime, the Supreme Court has refused to limit its application to organized criminals. United States v. Nardello, supra; United States v. Fabrizio, 385 U.S. 263 (1966). There is no more reason to limit the plain meaning of the statute to include only "typical tools of organized crime" than to limit it to include only organized criminals.[8/]

In further analyzing Congressional intent with respect to the Travel Act, Judge Gurfein determined that commercial bribery is a local violation and therefore unworthy of federal attention. This conclusion is, we respectfully submit, inconsistent with his earlier recognition in the opinion that a Congressional purpose in passing the Travel Act was to aid local enforcement agencies to enforce State laws. United States v. Brecht, supra at 5036. See also, United States v. Nardello, 393 U.S. 286 (1969). In this connection, we would also take issue with Judge Gurfein's apparent suggestion that commercial bribery is an unimportant crime. The fact that New York classes

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8/ We note parenthetically that the panel's opinion implies that if commercial bribery should become a typical "feature of organized crime" then such activity, without a change of even one word in the statute, would be included within the Travel Act.

commercial bribery as a misdemeanor is irrelevant for our purposes. The legislative history reveals no intent on the part of Congress to limit the scope of the proscribed "unlawful activities" in the Travel Act to felonies. United States v. Brennan, 394 F.2d 151 (2d Cir.), cert. denied, 393 U.S. 839 (1968). If Congress had intended such, it could easily have provided that "unlawful activities" only include extortion and bribery when classified as felonies by the states, or it could have provided lesser penalties for violations of the Travel Act based on misdemeanors.[9/]

III

We further submit that the panel's holding in this case is premised on an incorrect analysis of the relevant case law. Noting that the judges in this circuit have been sharply divided on the issue of whether "commercial bribery" is included within the meaning of "bribery" and that the Fourth Circuit has rejected appellant's contention,[10/] United States v. Brecht, supra at 5035, Judge Gurfein indicates that an interpretation of Nardello different from that given by the Fourth Circuit required the holding of this panel. Significantly, however, Judge Gurfein failed to state his reasons for disagreeing with Pomponio.

9/ See, for example, 18 U.S.C. §371.

10/ United States v. Pomponio, 511 F.2d 953 (4th Cir.), cert. denied, 423 U.S. 874 (1975).

In addition, Judge Gurfein does not reconcile his reading of Nardello as requiring a restrictive interpretation of the Travel Act, closely geared to an analysis of organized crime, with the fact that Nardello involved blackmail of a homosexual. There were no allegations that the defendants were related to organized crime or that blackmail was "a typical tool of organized crime." Just as the Supreme Court held that "extortion" was intended to be used in the generic sense and includes blackmail, the panel here should have held, as the Fourth Circuit did in Pomponio in reliance on Nardello, that bribery was intended to be used in the generic sense and includes commercial bribery. In sum, we submit that Nardello mandates a liberal rather than a restrictive interpretation of the terms of the Travel Act, and hence, the inclusion of commercial bribery as one of the "enumerated offenses," 393 U.S. at 293, in the statute.

Similarly, Judge Gurfein's reliance on United States v. Bass, 404 U.S. 336 (1971), and Rewis v. United States, 401 U.S. 808 (1971), to justify a restrictive approach in interpreting the Travel Act is misplaced. The discussion in

Bass of the federal-state balance concerned the Hobbs Act, where Congress had not expressed a clear intent, as it has in the Travel Act, to involve the federal government in enforcement of state laws. In addition, Rewis involved a gambling operation on the Florida-Georgia border where the customers crossed the border to gamble. The connection with interstate travel in Rewis was minimal, whereas in the instant case, appellant traveled to New York to negotiate the terms of the kickback and to receive the payment from the putative victim.

Finally, we submit that the holding of the panel will seriously hamper the Government's ability to prosecute those who engage in large-scale commercial bribery on an international level, an activity which is increasingly being brought to the Government's attention. It is difficult for the states, with more limited resources, to treat these activities as local matters; indeed, they are not simply local crimes. The holding in this case will foreclose the use of the Travel Act as an effective means of combatting this kind of corruption.

CONCLUSION

THE PETITION FOR REHEARING OR, IN THE ALTERNATIVE, FOR REHEARING EN BANC SHOULD BE GRANTED. THE CONVICTION OF APPELLANT ON TWO COUNTS OF TRAVEL ACT VIOLATIONS SHOULD BE AFFIRMED.

Dated: Brooklyn, New York
August 13, 1976

Respectfully submitted,

DAVID G. TRAGER
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(Of Counsel)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 13th day of August, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a PETITION FOR REHEARING W/SUGGESTION FOR REHEARING EN BANC of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

William J. Gallagher, Esq.
Legal Aid Society
Federal Defender Services Unit
509 U.S. Courthouse - Foley Square
New York, N.Y. 10007

Evelyn Cohen

Sworn to before me this
13th day of August, 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4518298
Qualified in Kings County
Term Expires March 30, 1977